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No. 98 ——

IN THE
Supreme Court of the United States
OCTOBER TERM, 1998

KANSAS CITY SOUTHERN RAILWAY COMPANY,
Petitioner,
v.
CHARLOTTE MCKENNA, *et al.*,
Respondents.

Petition for a Writ of Certiorari to the Circuit Court of Hinds County, Mississippi, First Judicial District

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Mississippi state court correctly held—in conflict with this Court's decision in *CSX Transportation, Inc.* v. *Easterwood*, 507 U.S. 658 (1993), and the clear intent of Congress—that the tort claims of plaintiffs below were not pre-empted by the Federal Railroad Safety Act and applicable regulations issued under the Hazardous Materials Transportation Act.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioner Kansas City Southern Railway Company ("KCS") was petitioner before the Mississippi Supreme Court and defendant before the Hinds County Circuit Court. Pursuant to S. Ct. Rule 29.6, KCS notes that its parent is Kansas City Southern Industries, Inc. Affiliated companies of Kansas City Southern Industries, Inc., are Gateway Western Railway Company, Gateway Eastern Railway Company, Berger Associates, Inc., Janus Capital Corporation, Southern Group, Inc., Southern Capital Corporation, L.L.C., Southern Industrial Services, Pabtex, Inc., Superior Tie & Timber, Trans-Serve, Inc., The Texas Mexican Railway Company, and Transportacion Ferroviaria Mexicana.

Respondents are over 4,000 plaintiffs who have filed suit against KCS in Hinds County Circuit Court; named respondent Charlotte McKenna is one of the plaintiffs. A complete listing of plaintiffs appears at App. 1 to KCS's Petition for Interlocutory Appeal to the Supreme Court of Mississippi.

Union Tank Car Company, Illinois Central Railroad Company, Gaylord Chemical Corporation, Gaylord Container Corporation, Vicksburg Chemical Company, Arie Genger, Cedar Chemical Corporation, Nine West Corporation, Trans-Resources, Inc., and TPR Investment Associates, Inc., are also respondents pursuant to S. Ct. Rule 12.6.

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Petition for a Writ of Certiorari to the Circuit Court of Hinds County, Mississippi, First Judicial District

PETITION FOR A WRIT OF CERTIORARI

The Kansas City Southern Railway Company ("KCS") respectfully petitions for a writ of certiorari to review the judgment of the Circuit Court of Hinds County, Mississippi, in this case.

OPINIONS BELOW

The decision of the Mississippi Supreme Court denying KCS's petition for an interlocutory appeal from the decision of the Hinds County Circuit Court is unreported and reprinted in the appendix hereto ("App.") at 1a. The judgment of the Hinds County Circuit Court is unreported and reprinted at App. 2a.[1]

[1] The Mississippi Supreme Court denied KCS's petition for an interlocutory appeal from the trial court's decision. The decision of the trial court thus is the judgment of the highest court in which decision could be had. *See Virginian Ry.* v. *Mullens*, 271 U.S. 220, 222 (1926).

JURISDICTION

The order of the Mississippi Supreme Court denying review was entered on June 22, 1998. App. 1a.[2] The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(a).

STATUTORY PROVISIONS INVOLVED

Pertinent provisions of the Federal Railroad Safety Act, 49 U.S.C. § 20101 *et seq.*, and of the Hazardous Materials Transportation Act, 49 U.S.C. § 5101 *et seq.*, are reprinted at App. 6a-18a.

INTRODUCTION

Article VI of the Constitution declares that the laws of the United States are the "supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const. art. VI, cl. 2. State law found to conflict with federal law is "without effect." *Maryland v. Louisiana*, 451 U.S. 725, 746 (1981); *McCulloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316, 427 (1819).

The "ultimate touchstone" of this Court's pre-emption analysis is congressional intent. *Retail Clerks Int'l Ass'n, Local 1625* v. *Schermerhorn*, 375 U.S. 96, 103 (1963). The intent of Congress to pre-empt state law may be "explicitly stated in the statute's language or implicitly contained in its structure and purpose." *Jones* v. *Rath Packing Co.*, 430 U.S. 519, 525 (1977). When the statute in question contains an express pre-emption clause, this Court must "in the first instance focus on the plain wording of the clause, which necessarily contains the

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[2] The time for filing a petition for writ of certiorari runs from the date of the highest state court's refusal to review the decision of the lower court. *American Ry. Express Co.* v. *Levee*, 263 U.S. 19, 20-21 (1923).

best evidence of Congress' pre-emptive intent." *CSX Transp., Inc.* v. *Easterwood*, 507 U.S. 658, 664 (1993).

The Federal Railroad Safety Act ("FRSA") contains such a pre-emption clause. State railroad safety standards—including those established by common law duties—may remain in effect only until the Secretary of Transportation has promulgated regulations covering the subject matter of the state standards. 49 U.S.C. § 20106. Pursuant to his authority under the FRSA, and pursuant to Congress's express desire for *national* regulation of railroad safety, the Secretary of Transportation has promulgated comprehensive federal railroad safety regulations—including comprehensive regulations covering the subject matter of rail transportation of hazardous materials, inspection and repair of tank cars, training and certification of tank car inspectors and hazardous-materials employees, and response procedures for emergency situations involving hazardous materials transported by rail.

KCS is a defendant in roughly 4,000 individual state court actions in Mississippi, as well as a massive Louisiana state court class action, brought on by the rupture of a railroad tank car and the resulting release of dinitrogen tetroxide, a hazardous chemical. Plaintiffs in these state court lawsuits invoked widely divergent punitive damages statutes. *See* Miss. Civ. Prac. & Proc. § 11-1-65; La. Civ. Code art. 2315.3 (repealed but applicable to the conduct at issue). Plaintiffs' claims against KCS—a railroad with only the most tangential connection to the chemical release—involve questions regulated by the federal government to the last detail. These claims are therefore pre-empted by the FRSA. The trial courts below, however, refused to dismiss respondents' state law claims, and neither the Mississippi nor the Louisiana appellate courts remedied the trial courts' clear error. This Court should intervene. Allowing two sets of state court actions against KCS to go forward on the basis

of state claims pre-empted by the FRSA flouts this Court's decision in *CSX Transportation, Inc.* v. *Easterwood*, 507 U.S. 658 (1993), defies the clear language of the FRSA, and thwarts the Supremacy Clause.

STATEMENT OF THE CASE

A. Statutory and Regulatory Background

The railroad industry has been subject to comprehensive federal regulation for over a hundred years. Beginning with the Safety Appliance Act of 1893, 49 U.S.C. § 20301 *et seq.*, and up to the present, Congress has undertaken to regulate "almost all aspects of the railroad industry, including rates, safety, labor relations, and worker conditions." *R.J. Corman R.R.* v. *Palmore*, 999 F.2d 149, 151-152 (6th Cir. 1993). The industry's long history of "pervasive and uniquely-tailored congressional action indicates Congress's general intent that railroads should be regulated primarily on a national level through an integrated network of federal law." *Id.* Federal regulation ensures uniformity of rules and regulations for railroads, which frequently operate across state lines, and have for more than a century been vital to the flow of interstate commerce in this country. *See generally* William H. Rehnquist, *The Supreme Court* 167-170, 175-185 (1987) (discussing the rise and regulation of railroads).

One of the many areas covered by federal law is railroad safety. In 1970, Congress enacted the Federal Railroad Safety Act ("FRSA") with an express purpose: to "promote safety in *every area* of railroad operations." 49 U.S.C. § 20101 (emphasis added).[3] The FRSA requires the Secretary of Transportation to "prescribe regulations and issue orders for *every area* of railroad safety,"

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[3] Originally codified at 45 U.S.C. § 421 *et seq.*, the FRSA was recodified in 1994, when Congress recodified all "laws related to transportation in one comprehensive title." H.R. Rep. No. 103-180, at 3 (1993).

id. § 20103(a) (emphasis added), and requires the Secretary to "consider existing relevant safety information and standards" in prescribing regulations and issuing orders under the Act. *Id.* § 20103(c). States may participate in "investigative and surveillance activities" to enforce federal safety regulations, if certified by the federal government. *Id.* § 20105; *see also* 49 C.F.R. § 212.1 *et seq.* (state safety participation regulations); *Missouri Pac. R.R.* v. *Railroad Comm'n of Tex.*, 833 F.2d 570, 578 (5th Cir. 1987) (FRSA "recognized and explicitly preserved the state's participation *in enforcement of the federal scheme*") (emphasis added).

While states are allotted a role in enforcing federal standards, the FRSA makes clear that "[l]aws, regulations and orders related to railroad safety shall be nationally uniform to the extent practicable." 49 U.S.C. § 20106; *see also Rayner* v. *Smirl*, 873 F.2d 60, 65 (4th Cir.), *cert. denied*, 493 U.S. 876 (1989); *Donelon* v. *New Orleans Terminal Co.*, 474 F.2d 1108, 1112 (5th Cir.) ("The ultimate goal of the Act is to establish nationally uniform control of railroad safety"), *cert. denied*, 414 U.S. 855 (1973). The legislative history of the FRSA also confirms Congress's intent to exert primary—indeed, nearly exclusive—authority over railroad safety. Congress recognized that the national railroad system was a unique entity, demanding a level of federal regulatory involvement not typical of other industries. Because "the vast bulk of railroad mileage, and operations thereover, are by companies whose operations extend over many State lines," H.R. Rep. No. 91-1194, at 13 (1970), Congress concluded that the safety of the Nation's railroad system would not be advanced by "subjecting the national rail system to a variety of enforcement in 50 different judicial and administrative systems." *Id.* at 11. Rather, the best and most efficient way to ensure the safety of the national railroad system was to "make all [safety] enforcement Federal in nature." *Id.*

Pursuant to his authority under the FRSA, the Secretary has promulgated detailed regulations governing railroad safety enforcement procedures, including inspection procedures, *see* 49 C.F.R. § 209.1 *et seq.*; railroad operating practices, *see id.* § 218.1 *et seq.*; safety standards for railroad locomotives, *see id.* § 229.1 *et seq.*; safety standards for grade crossings, *see id.* § 234.1 *et seq.*; and standards for the qualification and certification of engineers, *see id.* § 240.1 *et seq.* A railroad violating FRSA regulations is subject to civil penalties, *see* 49 U.S.C. § 20111, and the Attorney General has authority under the Act to initiate a civil action to enjoin a violation of safety regulations. *Id.* § 20112. States may bring actions to enjoin the violation of a railroad safety regulation or for civil penalties, if the Secretary of Transportation fails to bring an action within a specified period of time. *Id.* § 20113.[4]

Railroad transportation of hazardous materials in particular is governed by a second statute as well, the Hazardous Materials Transportation Act ("HMTA"), 49 U.S.C. § 5101 *et seq.* Enacted in 1975, the HMTA establishes an "elaborate scheme for the designation, handling, packaging, labeling, and shipping of hazardous materials." *New Hampshire Motor Transp. Ass'n* v. *Town of Plaistow*, 67 F.3d 326, 331 (1st Cir. 1995), *cert. denied*, 517 U.S. 1120 (1996); *see also Southern Pac. Transp. Co.* v. *Public Serv. Comm'n of Nev.*, 909 F.2d 352, 358 (9th Cir. 1990) (HMTA designed to implement "uniform, national scheme of regulation"). Enacted to "improv[e] the regulatory and enforcement authority of the Secretary of Transportation" over the transportation of hazardous material, 49 U.S.C. § 5101, the HMTA requires the Secretary to prescribe "regulations for the safe transportation of hazardous material in intra-

[4] States may not bring enforcement actions where the Secretary has certified that no violation of federal standards occurred. 49 U.S.C. § 20113(a).

state, interstate, and foreign commerce," *id.* § 5103(b)(1), and provides that the regulations shall govern "safety aspects of the transportation of hazardous material the Secretary considers appropriate." *Id.* § 5103(b)(1)(B).

Pursuant to this mandate, the Secretary has promulgated comprehensive regulations under the HMTA. *See* 49 C.F.R. §§ 171-179;[5] *see also Chlorine Inst., Inc.* v.

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[5] The regulations address, among other things:

- Pre-departure, interchange, and in-transit inspection of tank cars, *see* 49 C.F.R. Part 174;
- Manufacturing specifications for various types of tank cars, *see id.* Part 179;
- Equipment specifications for tank cars, *see id.*;
- Periodic testing of tank cars, *see id.* § 173.31(c);
- Repair and maintenance of tank cars, *see id.* Part 179 and Appendix R of the Association of American Railroads Specifications for Tank Cars;
- Marking and placarding of tank cars for identification of contents, *see id.* Parts 172, 174;
- Maximum pressure and weight limitations for compressed gases in tank cars, *see id.* §§ 173.314(c), 179.13;
- Identification and classification of hazardous materials, *see id.* Part 172;
- Documentation to accompany the transportation of hazardous materials, *see id.*;
- Hazardous materials transportation procedures, including loading and securing closures of tank cars, *see id.* Part 173;
- Handling of leaking tank cars, *see id.* and *id.* Part 174;
- Allocation of duties among shippers, originating carriers and interchange carriers, *see id.* Part 173;
- Operating rules governing hazardous-materials employee conduct and tests and inspections to ensure compliance with those rules, *see id.* Part 172;
- Education and training of hazardous-materials employees, *see id.*;
- Hazardous material release emergency notification procedures and maintenance of information necessary for response to hazardous materials incidents, *see id.* Part 171; and
- Public sector emergency response procedures, education, and training for response to hazardous materials incidents, *see id.* and *id.* Part 110.

California Highway Patrol, 29 F.3d 495, 497 (9th Cir. 1994) (HMTA regulations "impose extensive requirements" for shipment of hazardous chemicals). As with the FRSA, the HMTA has numerous enforcement provisions, allowing the Attorney General to bring civil actions to enforce that Act or its regulations and to seek "appropriate relief, including punitive damages" against a violator. 49 U.S.C. § 5122(a). The HMTA provides for civil penalties of up to $25,000 for a violation of the Act or its regulations, *id.* § 5123, and for criminal fines or imprisonment for up to five years for a willful violation of the Act or its regulations. *Id.* § 5124.

The FRSA contains an express pre-emption clause, displacing state law in all but certain narrow circumstances. By its plain terms, the FRSA allows state laws, rules, regulations, orders, or standards relating to railroad safety to remain in place only "until the Secretary of Transportation prescribes a regulation or issues an order covering the subject matter of the State requirement." *Id.* § 20106.[6] "Legal duties imposed on railroads by the common law," including through negligence claims, are equally susceptible to FRSA pre-emption. *Easterwood*, 507 U.S. at 664. The FRSA's pre-emption clause applies to "*any* regulation 'adopted' by the Secretary * * * regardless of the enabling legislation." *Id.* at 663 (emphasis added). Accordingly, regulations promulgated by the Secretary under the HMTA must be considered in a FRSA pre-emption analysis, where railroad transportation of hazardous materials is at issue. *See*

[6] Under the FRSA's savings clause, an "additional or more stringent" state law may remain in effect when it (1) is necessary to eliminate or reduce an "essentially local safety hazard;" (2) is not incompatible with a federal law, regulation, or order; and (3) does not unreasonably burden interstate commerce. *Id.* Common law negligence claims do not fall within this savings clause. *Easterwood*, 507 U.S. at 675 ("The common law of negligence provides a general rule to address all hazards caused by a lack of due care, not just those owing to unique local conditions.").

CSX Transp., Inc. v. *Public Utils. Comm'n of Ohio*, 901 F.2d 497, 501 (6th Cir. 1990) (considering HMTA regulations in context of FRSA pre-emption analysis), *cert. denied*, 498 U.S. 1066 (1991); *In re Miamisburg Train Derailment Litigation*, 626 N.E.2d 85 (Ohio 1994) (same), *cert. denied*, 513 U.S. 809 (1994).[7]

B. Factual Background

The Kansas City Southern Railway Company ("KCS") operates a commercial rail carrier system extending over nearly 2,000 miles of track from Chicago to Veracruz, Mexico and traversing ten states. In October 1995, KCS transported a railroad tank car carrying dinitrogen tetroxide from Vicksburg, Mississippi, east to Jackson, Mississippi, a distance of about forty miles. In Jackson, the railroad car was turned over to the Illinois Central Rail-

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[7] The HMTA's own pre-emption provision provides that a state requirement is pre-empted if (1) complying with the state requirement is "not possible," or if (2) the state requirement poses an "obstacle" to the purposes of the HMTA. 49 U.S.C. § 5125(a). In addition, a state law "not substantively the same" as the federal statutes or regulations is pre-empted if it addresses (1) the "designation, description, and classification of hazardous material;" (2) "packing, repacking, handling, labeling, marking, and placarding of hazardous material;" (3) "preparation, execution, and use of shipping documents related to hazardous materials and requirements related to the number, contents and placement of those documents;" (4) "written notification, recording, and reporting of the unintentional release in transportation of hazardous material;" or (5) the "design, manufacturing, fabricating, marking, maintenance, reconditioning, repairing, or testing of a packaging or a container represented, marketed, certified, or sold as qualified for use in transporting hazardous material." *Id.* § 5125(b). Even when considered only under the HMTA's pre-emption provision, putting the FRSA to one side, the state standards in this case are clearly pre-empted under section 5125(a), for the reasons stated in n.16 *infra*. The provisions of section 5125(b) also specifically encompass many of plaintiffs' common law claims, and pre-empt any state standards—including standards arising from common law duties—which are "not substantively the same" as those imposed by the federal regulatory scheme.

road, which transported the car a hundred miles south to the Gaylord Chemical Corporation in Bogalusa, Louisiana, a town near the Mississippi state line. Two weeks after KCS released the tank car to Illinois Central, the tank car ruptured at the Gaylord plant, releasing dinitrogen tetroxide into the air.

Following the chemical release, thousands of plaintiffs in Mississippi filed lawsuits against a dozen defendants. KCS—which had transported the railroad car for forty miles, some two weeks and a hundred miles distant from the accident—was named as a defendant in the Mississippi actions, along with the manufacturer of the dinitrogen tetroxide, the manufacturer of the tank car, the Illinois Central Railroad, and the Gaylord Chemical Corporation, among others. In addition to the roughly 4,000 individual lawsuits filed in Mississippi, thousands of plaintiffs in Louisiana filed class action lawsuits on the same facts against the same defendants (and a dozen insurance companies). The Louisiana actions were consolidated into a single class action,[8] while in Mississippi—which has no class action procedure—the over 4,000 individual actions were consolidated for pre-trial purposes only.

The Mississippi plaintiffs' individual complaints each stated the same allegations against KCS, claiming that KCS was negligent in transporting, maintaining, inspecting, and repairing the railroad tank car, had negligently trained or hired inexperienced hazardous-materials employees, and had failed to implement emergency notifica-

[8] On June 19, 1998, the Louisiana Supreme Court denied KCS's application seeking review of the decision of the trial court in the consolidated Louisiana class action that plaintiffs' claims in that action were not pre-empted by the FRSA and regulations issued under the HMTA. On September 17, 1998, KCS filed a petition for certiorari with this Court (S. Ct. No. 98-465) seeking review of that decision. That petition and this one raise the same questions and should be considered together.

tion procedures to address the possibility of a chemical release. Each of plaintiffs' claims was directed to conduct or procedures that are extensively addressed by the federal regulations adopted under the FRSA and the HMTA. *See supra* at 4-9.

KCS moved for judgment on the pleadings in the Mississippi actions. Explaining that the comprehensive network of FRSA and HMTA safety regulations completely "cover[ed] the subject matter" of each of plaintiffs' claims, 49 U.S.C. § 20106, KCS argued that the claims were pre-empted under the FRSA. The Mississippi trial court rejected KCS's FRSA pre-emption claim and denied KCS's motion for judgment on the pleadings, purporting to rely on this Court's opinion in *CSX Transportation, Inc.* v. *Easterwood*, 507 U.S. 658 (1993). KCS petitioned the Mississippi Supreme Court for review of the trial court's ruling. That court denied review without comment. App. 1a.[9]

REASONS FOR GRANTING THE WRIT

I. THE MISSISSIPPI COURT'S DECISION CONFLICTS WITH THIS COURT'S DECISION IN *EASTERWOOD*

A principal consideration governing the exercise of this Court's certiorari jurisdiction is whether a state court "has

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[9] The decision of the state trial court is subject to review by this Court under the fourth prong of *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469, 482-483 (1975), because "reversal of the state court on the federal issue would be preclusive of any further litigation on the relevant cause of action." Refusal to hear KCS's federal pre-emption claim at this time would also "seriously erode" the federal policy underlying that claim, by subjecting KCS to the burden of a massive state class action trial. *Id.* at 483; *see also Goodyear Atomic Corp.* v. *Miller*, 486 U.S. 174, 178-180 (1988) (reversal of holding that statute not pre-empted by federal law would preclude further proceedings, and failure to review "might seriously erode federal policy"); *Local No. 438 Constr. & Gen. Laborers' Union* v. *Curry*, 371 U.S. 542, 550 (1963) (postponing review of pre-emption claim would "seriously erode" national labor policy).

decided an important federal question in a way that conflicts with relevant decisions of this Court." S. Ct. Rule 10(c). The Mississippi trial court's refusal to dismiss plaintiffs' tort actions against KCS on pre-emption grounds directly conflicts with this Court's decision in *CSX Transportation, Inc.* v. *Easterwood*, 507 U.S. 658 (1993).

1. *Easterwood* arose from a wrongful-death suit against CSX, brought by the widow of a man killed when a CSX train collided with his truck at a Georgia railroad crossing. The plaintiff argued that CSX was negligent under Georgia law for failing to maintain adequate warning devices at the crossing and for operating the train at an excessive speed. CSX contended that the FRSA pre-empted both claims. After reviewing the Act's pre-emption provision, this Court posed the pertinent question as being whether the Secretary of Transportation had issued regulations which "substantially subsume[d]" Georgia negligence law pertaining to the "maintenance of, and the operation of trains at, grade crossings." *Easterwood*, 507 U.S. at 664.[10]

CSX argued that three separate sets of federal regulations pre-empted Easterwood's inadequate warning device claim. The first, 23 C.F.R. Part 924, required states receiving federal aid to implement "highway safety improvement programs." Designed to set forth "policy for the development and implementation of a comprehensive highway safety improvement program in each State," *id.* § 924.1, the regulations directed the states to consider, among other things, dangers posed by grade crossings. *Id.* § 924.9(a)(4). The Court rejected CSX's ar-

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[10] Because the FRSA's pre-emption clause requires that the federal regulations "cover" the subject matter of the state law in question, rather than merely "touch upon" or "relate to" the subject matter of that law, the Court concluded that "pre-emption will lie only if the federal regulations *substantially subsume* the subject matter of the relevant state law." *Id.* (emphasis added).

gument that the Part 924 regulations pre-empted Easterwood's negligence claim. The regulations did not "cover the subject matter" of maintenance of grade crossings, as required to find pre-emption of Easterwood's negligence claim; they merely "establish[ed] the general terms of the bargain between the Federal and State Governments"—states could obtain federal aid if they complied with certain policy guidelines. The Court therefore declined to find pre-emption based "solely on the strength of the general mandates" of Part 924. 507 U.S. at 667-668.

CSX next argued that the language in the Federal Highway Administration's Manual on Uniform Traffic Control Devices for Streets and Highways ("Manual"), 23 C.F.R. §§ 655.601-.603, pre-empted Easterwood's warning device claim. The Court again disagreed. Noting that the Manual itself expressly disavowed any intent to create " 'legal requirement[s]' " for the installation of any particular traffic control devices, 507 U.S. at 669 (quoting Manual at 1A-4), the Court refused to displace state negligence law "by means of an elliptical reference in a Government Manual." *Id.*

The Court viewed the third regulation differently. Promulgated by the Secretary of Transportation pursuant to the Highway Safety Act of 1973, 23 C.F.R. § 646.214 requires that a grade-crossing improvement project include an automatic gate with a flashing light signal (if certain conditions are present at the crossing) *or* receive federal approval, if federal funds "participate in the installation" of the warning devices. *Id.* § 646.214(b)(3), (b)(4). Unlike 23 C.F.R. Part 924 and the Manual, Section 646.214(b) establishes particular federal requirements for warning devices at grade crossings. Where applicable—that is, where federal funds had been used to make improvements at a grade crossing—the regulations therefore "cover[ed] the subject matter" of any state law imposing an independent duty on a railroad to use a particular warning device at the crossing. *Easterwood*, 507 U.S. at 671.

While the *Easterwood* Court found that 23 C.F.R. § 646.214(b)(3) and (b)(4) pre-empted claims of inadequate warning devices at federally-funded grade crossings, no federal funds were used to maintain the crossing involved in the *Easterwood* collision, and so the preemptive regulations were inapplicable on the facts of that case. Easterwood's negligence claim for inadequate warning devices was thus allowed to proceed. 507 U.S. at 673. Easterwood's second negligence claim, however —that the train was traveling at an excessive speed when it reached the crossing—was found to be pre-empted. A federal regulation established maximum operating speeds—variable depending on the class of track—for all freight and passenger trains. *Id.* (citing 49 C.F.R. § 213.9(a) (1992)). Because related safety regulations indicated that the maximum train speeds were set with safety and grade crossing concerns in mind, the maximum-speed regulation covered the subject matter of "train speed with respect to track conditions, including the conditions posed by grade crossings," and thus pre-empted any state law negligence claim based on excessive speed. *Id.* at 675.[11]

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[11] Following *Easterwood*, numerous lower courts have held that the FRSA pre-empted various state law claims. *See Ingram* v. *CSX Transp., Inc.*, 136 F.3d 858, 865 (11th Cir. 1998) (where federal funds are used in grade crossing improvement, inadequate signalization claim pre-empted); *Elrod* v. *Burlington N. R.R.*, 68 F.3d 241 (8th Cir. 1995) (state law negligence claim based on failure to provide adequate warning devices at crossing pre-empted); *Hester* v. *CSX Transp., Inc.*, 61 F.3d 382 (5th Cir. 1995) (state law negligence claims based on inadequate signalization at crossing pre-empted), *cert. denied*, 516 U.S. 1093 (1996); *Cox* v. *Norfolk & W. R.R.*, 998 F. Supp. 679 (S.D. W.Va. 1998) (negligence claim for excessive train speed pre-empted by FRSA); *Williams* v. *Burlington N. R.R.*, 849 F. Supp. 682 (E.D. Ark. 1994) (same). *Compare Southern Pac. Transp. Co.* v. *Public Util. Comm'n of Or.*, 9 F.3d 807, 813 (9th Cir. 1993) (state statute restricting sounding of locomotive whistles at certain times and crossings not pre-empted by FRSA; federal regulations required that locomotive whistles be of a certain decibel level, but did not address subject matter of restrictions on their use).

2. Thus, under *Easterwood,* if regulations promulgated by the Secretary of Transportation "substantially subsume" the subject matter of Mississippi negligence law regarding railroad cars transporting hazardous materials, plaintiffs' claims are pre-empted under the FRSA. *Easterwood,* 507 U.S. at 664. FRSA and HMTA regulations cover the subject matter of every single one of plaintiffs' specific claims against KCS.

The breadth and detail of the applicable FRSA and HMTA regulations are evident upon examination of just two of plaintiffs' claims. Plaintiffs alleged that KCS negligently failed to "properly and adequately inspect the chemical, tank car, facilities and equipment," McKenna Second Am. Complaint ¶ XXXII(a), and failed to "properly maintain and/or repair" the tank car and its component parts. *Id.* XXXII(d).[12] 49 C.F.R. Part 215, promulgated by the Secretary under the FRSA, governs railroad freight car safety standards, including inspections. 49 C.F.R. § 215.11 requires a railroad to designate "persons qualified to inspect railroad freight cars for compliance." Section 215.13 requires the inspector to make a pre-departure inspection "[a]t each location where a freight car is placed in a train," according to the procedure prescribed in Appendix D of Section 215. The procedure in Appendix D requires, "as a minimum," that any freight car "be inspected for the imminently hazardous conditions listed below that are likely to cause an accident or casualty before the train arrives at its destination," including inspecting for any "[b]roken or missing safety appliance[s]," for "[l]ading leaking from a placarded hazardous material car," or for "[a]ny other apparent safety hazard likely to cause an accident or casualty

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[12] The McKenna complaint is the lead complaint in the Mississippi actions, which have been consolidated for pre-trial purposes. All plaintiffs state the same or substantively the same claims against KCS.

before the train arrives at its destination." 49 C.F.R. § 215 App. D.

HMTA regulations impose additional detailed requirements on the qualification, use, and maintenance of tank cars used to ship hazardous materials.[13] A shipper of hazardous materials must determine "to the extent practicable, that the tank, safety appurtenances and fittings are in proper condition for the safe transportation of the lading," and adhere to detailed requirements for loading tanks. 49 C.F.R. § 173.31(b)(1) (1994).[14] Leaking tank cars "must not be offered for transportation until proper repairs have been made." *Id.* Closures of openings in tank cars must be secured "using a bar, wrench, or other suitable tool;" a wrench "having a handle at least 36 inches long must be used to apply the outlet valve cap." *Id.* § 173.31(b)(3). Tank cars of the type used to transport dinitrogen tetroxide must be tested every 10 years, by "completely filling the tank and manway nozzle or expansion dome with water or other liquid of similar viscosity * * * and applying the specified pressure [for dinitrogen tetroxide, 500 p.s.i.] for 10 minutes if the tank is not insulated, or 20 minutes if the tank is insulated." *Id.* § 173.31(c)(2) and Retest Table 1.

49 C.F.R. Part 174, governing inspection of tank cars carrying hazardous materials, requires that each such tank car and each rail car adjacent to it must be inspected "[a]t any point where a train is required to be inspected;" cars may continue in transit "only when the inspection indicates that the cars are in a safe condition for transportation." 49 C.F.R. § 174.8. Each tank car

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[13] HMTA regulations classify dinitrogen tetroxide as a Class 2.3 hazardous chemical. *See* 49 C.F.R. § 172.101.

[14] 49 C.F.R. § 173.31 was revised after the date of the October 1995 chemical release; the language quoted is from the regulation in effect as of that date. The revisions to the regulation do not affect the substantive issue on appeal.

"must be inspected by the carrier before acceptance at the originating point and when received in interchange." *Id.* § 174.9. A tank car "discovered in a leaking condition in transit may not be unnecessarily moved," *id.* § 174.50(a), must be protected against ignition of the liquid or vapor, *id.* § 174.50(b), and must be "stenciled on both sides in letters 7.5 cm (3 inches) in size, adjacent to the car number, 'LEAKY TANK. DO NOT LOAD UNTIL REPAIRED.'" *Id.* § 174.50(d). Procedures for repairs or alterations to tank cars are fully set forth in an appendix to the regulations. *See id.* § 179.6.

The scores of regulations covering the subject matter of plaintiffs' failure-to-inspect and failure-to-repair claims are representative of the regulations covering all of plaintiffs' other claims. In their comprehensiveness and degree of detail, the regulations are directly analogous to the type of regulations held to pre-empt the plaintiff's state law negligence claim in *Easterwood*. Far from the "general mandates" or "elliptical reference[s]" found insufficient to pre-empt state law in *Easterwood, see* 507 U.S. at 668-669, the regulations in fact completely "displace state and private decisionmaking authority" by establishing federal requirements for the transport of hazardous materials, the repair, maintenance, and inspection of tank cars, the hiring and training of hazardous-materials employees, and the procedures for addressing emergency situations. *Id.* at 670. The regulations clearly "substantially subsume" the subject matter of each and every one of plaintiffs' claims against KCS. *Id.* at 664.

3. Because dozens of federal regulations "cover[ed] the subject matter" of each of plaintiffs' claims, the trial court should have dismissed the claims against KCS as pre-empted by the FRSA. It did not. The court's sole rationale for denying KCS's motion for judgment on the pleadings was that plaintiffs had requested damages, a

remedy not available under the FRSA or the HMTA.[15] During argument on KCS's motion, the trial court actually agreed that there were "loads of federal regulations that have to do with what it is this Defendant did and [plaintiffs'] claims against this Defendant." App. 3a. But the court nonetheless concluded that it was "not persuaded that the federal statutes would preempt the state tort law claims," because "while the federal acts may provide some criminal and civil penalties, it would allow that no individual plaintiff would have a remedy for violations of any regulations that are specifically set forth in these acts." App. 5a. The trial court accordingly denied KCS's motion, ruling that plaintiffs should be allowed "the opportunity to pursue a remedy based on state law claims." *Id.*

The trial court's reasoning directly flouts *Easterwood*. If a claim for damages allowed a plaintiff to avoid the FRSA's pre-emption provision, *no* action for damages would ever be pre-empted under the FRSA. *Easterwood* itself gives the lie to that conclusion. *See also Elrod*, 68 F.3d 241; *Hatfield* v. *Burlington N. R.R.*, 64 F.3d 559 (10th Cir. 1995). When federal regulations cover the subject matter of a common law tort action, the tort action *may not proceed*, even if—as in *Easterwood*—the plaintiff's claim is for damages.

While state tort law (and the damages available thereunder) may serve different or additional purposes than the federal enforcement scheme, the FRSA expressly instructs that the *subject matter* of plaintiffs' claims governs the FRSA pre-emption inquiry, *not* the purpose of the state tort law regime. 49 U.S.C. § 20106. The test for pre-emption under the FRSA is straightforward: if fed-

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[15] *See Abate* v. *Southern Pac. Transp. Co.*, 928 F.2d 167, 170 (5th Cir. 1991) (no compensatory or punitive damages available under the FRSA); *see also Borough of Ridgefield* v. *New York Susquehanna & W. R.R.*, 810 F.2d 57, 60 (3d Cir. 1987) (no compensatory or punitive damages available under the HMTA).

eral railroad safety regulations cover the subject matter of a state law, the state law is pre-empted, no matter what purpose that law purports to advance. *See Florida Lime & Avocado Growers, Inc.* v. *Paul*, 373 U.S. 132, 142 (1963) (in implied pre-emption analysis, test is "whether both regulations can be enforced without impairing the federal superintendence of the field, not whether they are aimed at similar or different objectives"); *Gade* v. *National Solid Wastes Management Ass'n*, 505 U.S. 88, 105 (1992) ("In assessing the impact of a state law on the federal scheme, we have refused to rely solely on the legislature's professed purpose and have looked as well to the effects of the law.").

Confining the FRSA pre-emption inquiry to subject matter, not purpose, is sound practice: as other courts have noted, the *effect* of superimposing state tort liability on an extensive federal regulatory scheme is exactly the same as superimposing any other state-created statutory or regulatory standard, despite the sometimes divergent purposes of state tort law and a federal regulatory scheme. Compensation in tort is awarded when a defendant has been found liable in tort; that finding is necessarily based upon the conclusion that the defendant has violated some state-created standard of care. *See San Diego Bldg. Trades Council* v. *Garmon*, 359 U.S. 236, 247 (1959) ("[State] regulation can be as effectively exerted through an award of damages as through some form of preventive relief. The obligation to pay compensation can be, indeed is designed to be, a potent method of governing conduct and controlling policy."); *Law* v. *General Motors Corp.*, 114 F.3d 908, 910 (9th Cir. 1997) (liability in tort "induce[s] defendants to conform their conduct to a standard of care established by the state"); *Ouelette* v. *Union Tank Car Co.*, 902 F. Supp. 5, 10 (D. Mass. 1995) (tort actions, if allowed, would "generate precisely those inconsistencies in railroad safety standards that Congressional action was intended to avoid," because rail-

roads would "inevitably be subjected to varying interpretations of the federal regulations in different states").

The two regimes cannot coexist in this case. States have a role in enforcing railroad safety, but that role is prescribed and delimited by the FRSA. The fact that state tort damages may provide compensation otherwise unavailable to plaintiffs under the federal scheme provides no justification for permitting states to supplement established federal standards with their own. "[E]ven state regulation designed to protect vital state interests must give way to paramount federal legislation." *De Canas* v. *Bica*, 424 U.S. 351, 357 (1976). The Mississippi trial court's refusal to dismiss plaintiffs' claims against KCS on pre-emption grounds was clear error under *Easterwood*.[16]

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[16] This Court has also suggested that circumstances exist where, despite the existence of an express pre-emption provision, a court may still perform implied pre-emption analysis to find a state law pre-empted. *Freightliner* v. *Myrick*, 514 U.S. 280, 288 (1995). But the Court has yet to clarify *when* a court may look beyond an express pre-emption provision to find implied pre-emption. This case presents an opportunity to resolve that question. Even if not expressly pre-empted by the FRSA, plaintiffs' claims are impliedly pre-empted. State requirements are impliedly pre-empted where they frustrate Congress's objectives. *See, e.g., Gade* v. *National Solid Wastes Management Ass'n*, 505 U.S. at 98; *English* v. *General Elec. Co.*, 496 U.S. 72, 78-79 (1990). Allowing state tort actions against railroads for their alleged failure properly to transport hazardous materials by rail opens the industry up to 50 different state standards of care, and to liability based not on the judgment of the federal government as to what standards the railroad must meet, but instead on the individualized and disparate judgments of thousands of state-court juries. Federal regulation has pervaded the railroad industry for a hundred years; particularly under the FRSA, where Congress has *expressly* stated its intent that railroad safety be regulated on a national level, state tort claims raising safety issues regulated to the last detail by federal authorities pose a very real risk of undermining the entire federal regulatory scheme, and frustrate the "accomplishment and execution of the full purposes and objectives of Congress." *Hines* v. *Davidowitz*, 312 U.S. 52, 67 (1941). This Court should grant certiorari to clarify in what circumstances a court may look beyond express pre-emption provisions and find implied pre-emption.

The trial court's ruling contradicts *Easterwood* on another ground as well. Because the court erroneously concluded that plaintiffs' request for damages circumvented the FRSA pre-emption statute, it did not address plaintiffs' claims individually. But to determine whether a complaint containing multiple claims is pre-empted under the FRSA, a court must examine each individual claim to determine whether federal regulations cover the subject matter of that claim. *Easterwood*, 507 U.S. at 665; *see also Cipollone* v. *Liggett Group, Inc.*, 505 U.S. 504, 523-524 (1992) (Court's pre-emption analysis addressed "each category of damages actions in turn"); *Easterwood* v. *CSX Transp., Inc.*, 933 F.2d 1548, 1553 (11th Cir. 1991) (task in FRSA pre-emption case is to "examine each claim and determine if any federal regulations have been promulgated which cover the conduct at issue"), *aff'd*, 507 U.S. 658 (1993). Plaintiffs' individual claims against KCS involve several different subject matters: the transportation of hazardous materials, inspection of tank cars, hiring and training of hazardous-materials employees, and proper public-sector notification and emergency procedures. These are all distinct subject matters under the FRSA, and all should have been analyzed separately under *Easterwood*.

But the trial court did not examine *any* of plaintiffs' specific claims in this case. Instead, while acknowledging that "loads of federal regulations" dealt with the subject matter of plaintiffs' claims, the court issued a blanket ruling allowing each claim to go forward on the strength of plaintiffs' claim for damages alone. This was legal error. It contradicts *Easterwood*, greatly prejudiced KCS, and should be corrected before KCS is compelled to endure years of boundless, duplicative and competing litigations in state court.

II. THE QUESTION PRESENTED IS IMPORTANT AND SHOULD BE DECIDED BY THIS COURT

The conflict between the decisions of the Mississippi courts below and this Court's decision in *Easterwood* provides a compelling basis for review, but the need for certiorari is heightened still further by the importance of the issue at hand. KCS transported a rail car for forty miles, two weeks before and a hundred miles distant from the Bogalusa chemical release. Despite its obviously minimal role and removal in time from the Bogalusa accident, KCS finds itself a defendant in thousands of individual suits in Mississippi state court *and* a massive class action lawsuit in Louisiana state court. Without this Court's intervention, KCS will be forced to expend millions of dollars to defend itself in endless—and duplicative—trials, against thousands of plaintiffs with claims that are clearly pre-empted by the FRSA.

KCS's plight illustrates exactly why Congress concluded that railroad safety standards were best enforced by the federal government. As things now stand, two separate juries in two separate states will pass judgment on whether KCS complied with its duties under each state's disparate negligence and punitive damages standards. This is precisely the sort of situation Congress anticipated when it declined to "subject[] the national rail system to a variety of enforcement in 50 different judicial and administrative systems" and instead enacted the FRSA with its express pre-emption provision. H.R. Rep. No. 91-1194, at 11. The Mississippi and Louisiana litigations against KCS threaten substantially to undermine the uniform regulatory scheme Congress envisioned—and required—with the passage of the FRSA. This Court should grant certiorari to review the decisions below allowing these state court actions to proceed in the face of the compelling need for uniform federal regulation.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

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